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REPLY BRIEF FOR PETITIONER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 696

DAWN L. ALLEN,

Petitioner,

vs.

WILLIAM STANLEY LITSINGER AND ELIZABETH KNAPP LITSINGER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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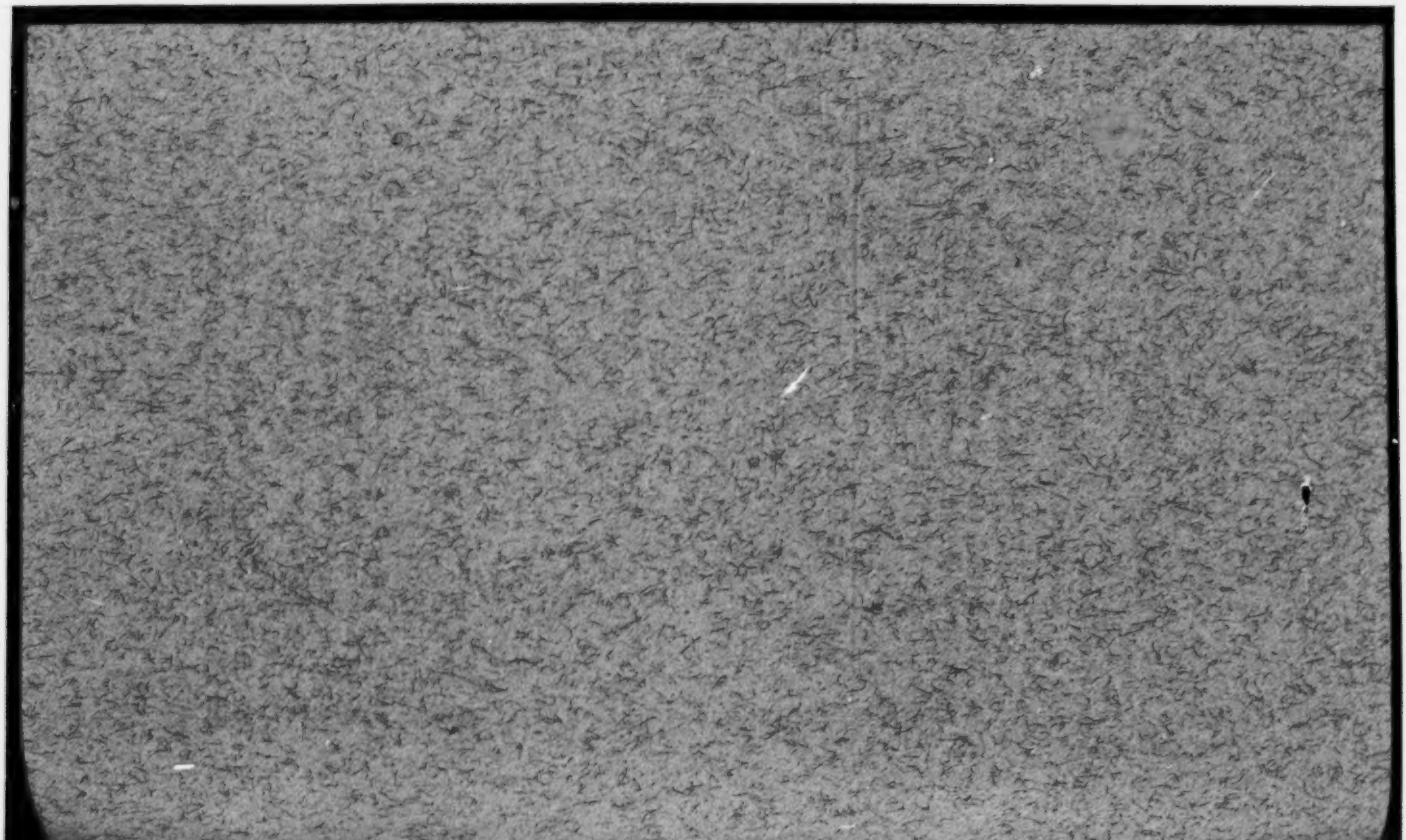

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REPLY BRIEF FOR PETITIONERS

Preliminary Statement

The purpose of this reply brief is to focus attention upon the factual errors and legal fallacies of Respondent's argument. The answer to Respondent's principal argument is left to Petitioner's main brief and the oral presentation, if allowed. Here, we shall confine ourselves to the false premises upon which Respondents' argument is founded.

A most succinct statement of the controversy will suffice for an understanding of the points made herein.

Your petitioner, a natural mother, is endeavoring to recover her infant now in the custody of the adoptive parents, Respondents in this case. On November 18, 1946, Petitioner, then resident in the home of the Reverend Raymond Stanley Litsinger, uncle of Respondent, William Stanley Litsinger, signed an agreement which allegedly authorized the adoption of her baby, upon birth, by Respondents.

Petitioner asserts that her consent to this agreement was obtained by duress and coercion and, therefore, was null and void. It should be stated, moreover, that the alleged consent contained in the said agreement was not the statutory consent the obtention of which is made mandatory by Virginia Law. *1948 Cum. Supp. to the Virginia Code of 1942, Annotated* (Michie), p. 391.

The child was born on January 6, 1947, and on January 13, 1947, was taken to Tappahannock, Virginia, by Respondents.

On March 18, 1947, Petitioner signed a statutory consent to adoption under coercion and duress exercised by the Reverend Litsinger and his wife.

On May 7, 1947, the Circuit Court of Essex County, Virginia, entered an interlocutory decree awarding temporary custody of the child to Respondents. The interlocutory decree was to remain in force and effect only for a period of one year.

Petitioner filed in the Circuit Court of Essex County on February 21, 1948, timely notice and petition praying the Court to revoke the interlocutory order previously entered and to make an order directing Respondents to deliver the custody of the child to Petitioner. The effect of this petition was to revoke Petitioner's alleged "consent" to the adoption of her child by Respondents. It should be clearly understood that Petitioner's notice and motion were filed while the one-year interlocutory decree was operative and

prior to entry of a final decree of adoption. Following hearing on June 4, 1948, the Circuit Court of Essex County dismissed the petition and made a final order awarding permanent custody of the child to Respondents.

An extraordinary circumstance occurred during the aforementioned hearing. Petitioner's counsel offered in evidence a report of a Virginia Public Welfare Department worker the substance of which was entirely favorable to petitioner's case. The presiding judge of the Circuit Court of Essex County allowed the report to be read into evidence, but absented himself from the court-room while the evidence was being received. Hence, this evidence was not before him for consideration at the time he made the decision in the case which denied petitioner's application for relief.

Petitioner duly objected and excepted to the order issued by the Circuit Court of Essex County and appealed to the Virginia Supreme Court of Appeals. The latter Court, on the 16th day of November, 1948, rejected the petition and refused petitioner's appeal. The result of this was to affirm the decree of the Circuit Court of Essex County. It is here significant to observe that notwithstanding the obvious legal errors appearing in the record, and the patent denial of due process of law to Petitioner, the Virginia Supreme Court of Appeals expressed no opinion on the numerous allegations of error in the record and delivered merely a *per curiam* decision.

On February 9, 1949, Petitioner obtained from the Supreme Court of the United States an order extending the time for filing a petition for a writ of certiorari addressed to the Supreme Court of Appeals of Virginia, until April 15, 1949. On April 15, 1949, the petition for a writ of certiorari was filed in this Court. The jurisdiction of the Supreme Court was invoked under Section 1256 (3) of the Judicial Code, as amended, 28 U. S. C. A. 1257.

In general it may be said that Petitioner relies on two major premises of law. First, that since there was no consent to the adoption on part of Petitioner, there was no jurisdiction over the subject matter of the adoption on the part of the Circuit Court of Essex County, Virginia, and that, hence there was a deprivation of due process of law when the court proceeded to enter a decree when it lacked the vital element of jurisdiction over the subject matter. Secondly, that there was a violation of due process of law within the meaning of the Fourteenth Amendment to the United States Constitution by virtue of the deliberate and willful absence from the bench of the Judge of the Circuit Court of Essex County during the presentation of evidence entirely favorable to petitioner's case.

1. There was No Valid Consent to the Adoption by Petitioner

The assertion in Respondent's brief that Petitioner voluntarily consented to the adoption of her child by strangers is absurd and fantastic. The record in the case overwhelmingly repudiates this contention. (R. 21, 22, 23, 24, 28, 32, 57, 60, 95, 96, 100, 125, 129, 225, 290.) If coercion and duress have any meaning and effect in law, the pattern of conduct followed by the Reverend Litsinger and his wife in virtually bludgeoning Petitioner into signing the consent falls well within the purview of such meaning and effect.

The only circumstance that mitigates the indiscretion of the zealous pair is that they acknowledged their error and displayed their contrition in their depositions read before the Circuit Court of Essex County. (R. 21, 22, 23, 24, 57, 60.) The legal significance of these damaging admissions apparently escaped the learned judge of that court, for he made no comment thereon in his abbreviated and summary opinion. Indeed, it is of more than passing importance at this juncture to point out that the opinion of the same

learned judge was barren of any reference to cases, text books, or other legal authorities in point, although the law on the subject is reasonably copious.

Respondents' statement in their brief that "no duress was brought to bear upon petitioner" is diametrically opposed to evidence which fairly stands out in the record. Respondents in advancing this contention, are engaging in little more than wishful thinking.

2. Petitioner's Alleged "Consent" to the Adoption Was Withdrawn Before Entry of a Final Decree of Adoption. Hence, the Final Decree Was Invalid for Want of Consent.

Respondents apparently have evaded the fact that the general majority rule of law in the United States clearly favors the right of a mother to revoke her consent to an adoption before the entry of a final decree transferring custody of her child. The cases in support of Petitioner's position are set out and analyzed in the principal brief at pages 24-35, inclusive. Consequently, there is no need to review them here. However, it certainly should be said that the great body of both American and British law give credence to the view that a natural mother—or any mother, for that matter—may withdraw her consent to the adoption of her child previously given, during the effective period of an interlocutory decree.

The rationale of the prevailing rule is quite simple. If the initial, or interlocutory, decree provided for by the law of Virginia (or any State) in adoption matters were to be final, then, indeed, would the probationary period also sanctioned by the law be meaningless. A more intelligent and reasonable construction of the Virginia statute would hold the probationary period under the interlocutory decree to be one in which either the adopting parents might renounce

the adoptive undertaking or the mother might withdraw consent to the adoption.

On the one hand, a child might display, during the one year period, congenital defects, previously unobserved and unrecognized, which would cast an unreasonable burden upon the adoptive parents and cause them to abandon their earlier intendment to rear the child. On the other hand, the consent of a mother given during pregnancy or close to the time of childbirth, should be retractable at a later time when more deliberate and calculated judgment might be exercised. The physical pain and mental anguish of the delivery room do not represent a good setting for a carefully reasoned decision.

If these latter factors, under the prevailing American rule, may constitute a valid ground to support withdrawal of consent to adoption already given, how much more persuasive is the case for the validity and propriety of such withdrawal when the alleged "consent" was obtained by methods strongly suggestive of coercion and duress!

Respondents have cited several cases in an effort to rebut the validity of the majority rule on revocation of consent. Examination and analysis show each to be extraneous to the issue here presented.

In the 1946 District of Columbia Case of *In re Adoption of a Minor,* 155 F (2) 870, an unwed mother was denied the right to withdraw her consent to the adoption of her child by strangers. However, this action of the District Court was bottomed on the peculiar and specific provision of the District Code which, under certain conditions, directly permitted the court to dispense with the consent of a natural parent. *District of Columbia Code* (1940), Title 16, Sec. 202. The latitude thus allowed represents a sharp contrast with the Virginia law, *supra,* which requires the consent of the natural mother as a condition precedent to

a valid adoption. It should be noted that the case under discussion was reversed by the United States Court of Appeals (D. C.) for the reason that consent of the putative *father* was not obtained.

The right of a mother to withdraw her consent to an adoption was refused in the Massachusetts case of *Wyness* v. *Crowley,* 292 Mass. 461, 198 N. E. 758 (1935). Not only was this holding squarely opposed to the weight of authority, but may easily be distinguished from the present case for the reason that in the Massachusetts case there was no question of the voluntary character of the mother's consent, whereas here we find the strongest evidence of no real consent at all.

Similarly, no question of the voluntary nature of the consent given was raised in *Lane* v. *Pippin,* 110 W. Va. 358, 158 S. E. 673 (1931). Yet in the case at issue not only does Petitioner allege strong coercion and duress, but the admissions of the Reverend and Mrs. Litsinger confirm the fact that Petitioner's consent was obtained in a totally unlawful manner.

Consequently, Petitioner's position is practically unassailable. The record irrefragably discloses the use of coercion and duress as media for obtaining the alleged "consent". Hence, there was no consent *ab initio* as required by the cited provision of Virginia law. Alternately, even if there existed a colorable and questionable "consent" on Petitioner's part, such "consent" was void under the majority rule by Petitioner's affirmative act of withdrawal.

3. Lacking the Statutory Consent Required by Virginia Law, the Circuit Court of Essex County Had No Jurisdiction Over the Subject Matter of the Adoption. In the Absence of Such Jurisdiction, Therefore, the Entry of a Final Decree of Adoption by that Court Violated Due Process of Law under the Fourteenth Amendment to the United States Constitution.

The above legal theory and reasoning are set forth in Petitioner's main brief at pages 36-47, inclusive. Petitioner has taken note of the fact that Respondents' brief contains no legal authority or reasoning in rebuttal to Petitioner's presentation. Neither have Respondents elected in any way to argue against any fact of Petitioner's foregoing proposition of law.

4. The Misconduct of the Judge of the Circuit Court of Essex County in Deliberately and Willfully Leaving the Court Room While Testimony Favorable to Petitioner Was Received in Evidence Constituted a Violation of Procedural Due Process of Law.

The efforts of Respondents to explain the misconduct of the Judge of the Circuit Court of Essex County in leaving the bench and court-room while highly important evidence favorable to petitioner, was being received are puerile and unconvincing.

Respondents allege that the judge had ruled inadmissible a report of a welfare worker, who was called upon to testify in the case, on the ground that such welfare worker had only interviewed persons who had already testified in this case and whose evidence was in the record. Nevertheless, and notwithstanding such negative ruling, the judge permitted this evidence to be introduced. Such action assuredly represents an amazing ambiguity. If the evidence were inad-

missible it should not have been included in the record; conversely, if the evidence were admissible it was with complete propriety that it appeared in the record. In either case there was absolutely no justification for the judge, under whose direction the entire hearing was being conducted, to leave the court room while evidence was being received.

In so far as the weight of this evidence is considered, it may be pointed out with entire accuracy that the welfare worker whose report was received in evidence by the judge was the only official of the Virginia Department of Public Welfare who personally had interviewed petitioner and was in a position to evaluate from the sociological point of view the merits of her claim for the custody of her child. This report of Miss Ruth Seldenright, the welfare worker, concluded with the highly important statement that "there would seem to be many factors favorable to Miss Allen's application, in particular her training and her work adjustment and her constant effort to regain the custody of her child" (R. 195).

The aforementioned report constituted a full and adequate history of petitioner's childhood, education, teaching experience and other activities. It outlined in detail the questionable circumstances under which the petitioner gave her alleged "consent" to the adoption of the child by Respondents and disclosed the duress under which petitioner's consent to the adoption was obtained.

Most significant is the fact that this report was required under the Virginia Statute of Adoption. *Virginia Code of 1942, Annotated* (Michie), Sec. 5333(c).

Notwithstanding the heavily weighted value of this evidence in favor of petitioner's case, the complete disinterest of the court in this evidence is characterized by the judge's statement that "you can put it in, but this Court will not consider it" (R. 188).

Petitioners in their main brief (pages 48-52) have fully indicated the highly irregular character of this violation of due process of law engendered by the willful absence of the trial judge from the bench and the court-room. The basic legal fallacy of such misconduct may be summarized in the axiom "where there is no Judge there is no Court."

5. The Fact That Respondents Have Had Custody of the Child Practically from Birth Is Not Controlling

Respondents assert that they are entitled to retain the child in their custody for the reason that they have had him practically from birth.

To concede the validity of this argument would be to ratify an act unconstitutional from its inception. The law of the land does not sanction the condonation of fundamental illegality.

Respondents have had the child since 1947 only because they took advantage of Petitioner's alleged "consent", unlawfully obtained, to seize and carry away the baby from the hospital nursery. Were it not for the tainted and colorable "'consent", Respondents' conduct would have constituted no more than kidnapping. Since that day of Respondents' callous act, Petitioner has incessantly endeavored to recover her baby. The fact that she has failed in her efforts in the courts of Virginia casts no shadow of disapproval upon Petitioner. She has acted in timely fashion on all occasions in her campaign to regain custody of her infant.

6. Failure to Raise the Federal Questions of Due Process of Law in the Courts Below Do Not Exclude This Court's Jurisdiction Based Thereon Following Petition for a Writ of Certiorari.

Petitioner's counsel below disregarded or failed to recognize the important Federal questions here involved.

It is settled law, however, that this Court may determine for itself, on petition for a writ of certiorari, whether a Constitutional question may be involved in a particular case. This is always true irrespective of the nature and scope of proceedings in the courts of a State. This point is discussed in Petitioner's main brief, pages 44-48.

7. The Child's Welfare Would Best Be Served by His Restoration to the Natural Mother

Since January 12, 1947, the child has been in the custody of Respondents at Tappahannock, Virginia. Tappahannock is a small resort community (population, 1200). As the result of the contested adoption proceeding in the local court house on June 4, 1948, it is obvious that practically every one in Tappahannock knows about the case.

The fertile imagination of a small town as a breeding ground for malicious gossip is well known. The fact of the child's illegitimacy is already established in the mind of the town of Tappahannock. Magnanimity of viewpoint on moral lapses is the exception in rural communities. Within three years the infant will enter school. At an early age he will become familiar with the meaning of the term "bastard". This word will be used to stigmatize him through childhood, puberty and adolescence. Not until he leaves Tappahannock will its grim and sardonic import be shaken loose. The inferiority complex generated by life in Tappahannock under such conditions he may never shed.

The natural mother is a college graduate and an experienced teacher of children. She holds gainful employment on the faculty of a large and respected private school for children. Her annual income exceeds that of both Respondents combined. She resides in metropolitan Arlington County, Virginia, across the Potomac from the City of Washington. If the child be restored to the natural mother, he will be reared in a large city where questions of origin and paternity will not be pressed.

It should be added that Respondents will encounter little difficulty in adopting another child. On the other hand, there can be no substitute for the love and affection that the natural mother will bestow on her very own child. No other child will suffice for the natural mother.

All things considered the welfare of the child, as well as the basic justice, will be served by placing the infant in the custody of his natural mother.

Conclusion

Petitioner's theory of the case briefly may be summarized as follows:

1. Petitioner did not consent to Respondents' adoption of her child.

2. Petitioner's alleged "consent" to the adoption, obtained by duress and coercion, was withdrawn in timely fashion during the pendency of the interlocutory decree of adoption and before entry of a final decree.

3. There being no consent to the adoption under Virginia law, the trial court lacked jurisdiction over the subject matter of the adoption.

4. Without jurisdiction over the subject matter of the adoption, the entry of a final decree of adoption by the trial court violated due process of law within the contemplation of the Fourteenth Amendment.

5. The deliberate and willful absence of the trial judge from the bench and court room during the reception of evidence violated procedural due process of law under the Fourteenth Amendment.

A careful review of Respondents' brief discloses no substantial rebuttal to the legal theory of, and the copious factual support for, Petitioner's case.

Much importance hinges upon the question of whether Petitioner's alleged "consent" was valid as a matter of law. Petitioner respectfully, yet emphatically, contends that she did not freely and voluntarily consent to the adoption of her child by Respondents at any time. We reiterate that the record is filled with undenied evidence that the so-called "consent" was obtained from Petitioner in her days of remorse and anguish by insidious and persistent methods that were misdirected in their conception and execution.

Despite the summary and arbitrary treatment she has received at the hands of the Virginia courts, Petitioner yet has faith in ultimate justice and strong courage in the righteousness of her position.

Petitioner has been made aware that this case is one of novel impression in this Court. However, she stands undismayed by this latter circumstance, for she is confident that this Court will not divest her of the mantle of legal rights with which the Constitution clothes her.

As an educated woman and a teacher of the young she is conversant with the history of the Court. She knows of the occasions when the strong arm of the Court has reached forth to give aid and comfort to those oppressed by the harsh and Draconian rulings of lesser tribunals.

She recalls the Court's firm and unfaltering course in the *Dred Scott* decision when the clouds of disunity and civil war were gathering. Petitioner knows of the Court's

annulment and sharp censure of unbridled military caprice and power in *Ex-parte Milligan*. She draws hope and comfort from the decision of this Court, in a more recent time, which nullified mob tyranny and the studied and persistent blindness of the state courts in the *Scottsboro* case.

Petitioner indefatigably has fought to regain her child. Although the world come against her, and defeat press hard upon defeat, she will never relinquish her efforts to recover her baby.

With the help of Almighty God she will prevail against all odds.

Firm in the conviction that justice is on her side, she appeals to this Court in the name of humanity and the divinely bestowed right of motherhood, to restore her child.

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